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CERTIFICATE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 227.

CHARLES H. TREAT, U. S. COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR.

VS.

STEPHEN V. WHITE, DEFENDANT IN ERROR.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 19, 1900.

(17680.)

ARGUMENT OF S. V. WHITE, DEFENDANT IN ERROR IN PERSON.

1 United States Supreme Court.

October Term, 1900. No. 227.

CHARLES H. TREAT, UNITED STATES COLLECTOR of internal revenue, *Plaintiff in error*,
vs.
STEPHEN V. WHITE,
Defendant in error.

BRIEF OF DEFENDANT IN ERROR.

2 As will be seen by the record in this case, page 2, this cause is before this court on a request made by the circuit court of appeals for the second circuit, desiring instruction of the supreme court for its proper decision as to whether a "call" in these words:

NEW YORK, *May* 18, 1899.

For value received the bearer may call on me on one day's notice, except last day, when notice is not required, for one hundred shares of the common stock of the American Sugar Refining Company, at one hundred and seventy-five per cent. any time in fifteen days from date. All dividends, for which transfer books close during said time, go with the stock. Expires June 2, 1899, 3 p. m.

3 (Signed) S. V. WHITE.

is an "agreement to sell" under the provisions of section 25, Schedule A, act of Congress approved June 13th, 1898, and as such, taxable.

The defendant in error contends that it is not taxable, and in support thereof he calls the attention of the supreme court to the following:

In applying the rules of law covering the construction of this statute the attention of the court is called to the very severely penal provisions of the law. In this same section of the law we find this provision:

4 "Any person or persons liable to pay the tax as herein provided .....who shall make any such sale, or who shall in "pursuance of any such sale, deliver any such stock, or evidence "of the sale of any such stock or bill or memorandum thereof, "as herein required, without having the proper stamps affixed "thereto, with intent to evade the foregoing provisions shall be "deemed guilty of a misdemeanor, and upon conviction thereof

5 "shall pay a fine of not less than five hundred nor more than
"one thousand dollars, or be imprisoned not more than six
"months, or both, at the discretion of the court."

and the rule at once obtains that every penal statute must be strictly construed.

But this law could not be held to require stamps upon an option to sell stock, if, instead of being a penal statute, it were a statute giving enlarged, equitable jurisdiction for the aid of an orphan asylum.

If the same is taxable it is under the provision of section 25, Schedule A, Stamp Taxes, parts of the 7th to the 17th lines, which
6 are in these words:

"On all sales or agreements to sell, or memoranda of sales, or
"deliveries or transfer of shares, or certificates of stock in any
"corporation on each hundred dollars of face value,
"or fraction thereof, two cents."

The rule in regard to the construction of all acts which the courts have constantly acted upon, "is to take the words in their ordinary, grammatical sense, unless such a construction would be obviously repugnant to the intention of the framers of the instrument or would
7 lead to some other inconvenience or absurdity." (Sedgwick Construction of Statutory Law, page 220, quoting Parke, B.)

The supreme court of New York in Walter vs. Harris, 20th Wendell, 555, held "That the current of authority at the present day is in favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation."

Arriving at the natural every-day meaning of "agreement to sell," we look at the definition as given in the dictionaries, and, referring to the Standard Dictionary, it defines agreement in law: First, mutual
8 assent; second, a contract. So that, in order to constitute an agreement to sell, there must be the *mutual assent* of a seller and a buyer, or, taking the word "contract," their must be a drawing together (*Latin, contraho—contractum*), or assenting to the purchase by a purchaser.

Applying these principles to the case in point it must be borne in mind that the definition of a "call" was known not only to lawyers,

9 but to lexicographers, when this law was passed, as well as was the definition of a promissory note. Webster, in his unabridged dictionary, more than fifteen years ago printed the following definition of a "call": "The privilege to demand the delivery of stock, grain, or any commodity at a fixed price, at or within a certain time agreed on."

The Standard Dictionary, published by Funk & Wagnall in 1896, gives the following definition: (No. 9) "A contract conveying, in consideration of money paid, the privilege of calling for (demanding) within a designated period, and agreeing to deliver on demand, some article named, as wheat or cotton, on payment for the same at a stipulated rate or price: the opposite of put."

10 The Century Dictionary, published on May 1, 1889, gives the following: "In the Stock Exchange, the privilege secured by contract and for a consideration of claiming or demanding and receiving a certain number of shares of some particular stock at a specified price, and within a stated period.

The following is a copy of the form commonly used:

NEW YORK, [*Name the date*]

"For value received, the bearer may call on me for [*so many*] of the common stock of the [*Name the Stock*] at [*Name the Price*] per cent. any time within [*so many*] days from date. The bearer is entitled to all dividends or extra dividends declared during the time.

11 Treatises had been written upon "Calls." In Ray on Contractual Limitations; pages 43 to 47, inclusive, are devoted to a discussion of "puts" and "calls," and "straddles." Cases are cited almost without number in reference to enforcing specific peformance, or to declaring them null and void, as coming under the Gambling Law.

Illinois had passed a special statute prohibiting them in that state, or declaring them to be gambling contracts, and therefore void; but there is nowhere any pretense in any book, that such options are agreements to sell until the buyer has, on his own behalf, agreed to buy. Such options, "puts," "calls" and "straddles" are discussed at length, with the rulings upon
12 them, in Dos Passos on Stock Brokers, pages 444 to 455, inclusive. (See also Dewey on contracts for future delivery, published in 1886, page 27, and elsewhere in said volume.) The authorities upon options and definitions from dictionaries are only cited to show that calls were not only known in the trade, but were known in law, and if the legislative body desired their taxation they would have stated so fully as they stated a tax on deeds or promissory notes.

13 I cite the dictionaries, and the treatises, and statutes, and decisions defining "calls" to show affirmatively that there could be no excuse for the legislative body which framed this law for omitting their mention, if it had desired to tax them. To show the care exercised by the legislative body I cite the following:

Premising that there are no two written instruments more nearly interchangeable in meaning than are checks and drafts, yet Congress enacted that a "bank check, draft, or order for the payment of any sum of money" should bear a two cent stamp, showing the care with which they framed the law so that there should be no misconstruction.

14 On the general question as to the spirit in which laws imposing revenue duties are to be construed, reference is made to the language of Mr. Justice Story in Adams vs. Bancroft, Third Sumner, page 336, in which he says:

> "Laws imposing duties are never construed beyond the natural "import of the language: and duties are never imposed upon "the citizen upon doubtful interpretations; for every duty im- "poses a burden on the public at large, and is construed strictly, "and must be made out in a clear and determinate manner from "the language of the statute."

15 The interpretation of statutes in respect to adhesive stamps has not been large in this country, because we have for so short a period of our national history imposed taxes by that method. But this Court in United States against Isham, 17 Wall., 503, said that

> In cases where there is any doubt as to the liability of an instrument to taxation the construction is in favor of the exemption, because a tax cannot be imposed without clear and express words for that purpose.

The case of Girr vs. Scudd, cited *infra*, is cited and followed by this Court in U. S. vs. Isham, in which Pollock, C. B., is quoted as
16 saying, "A tax cannot be imposed without clear and expressed words for that purpose."

This court follows the English authority in Williams vs. Jarrett, 5; Barnewall vs. Adolphus, 32, and Whistler vs. Forster, 14, Common Bench, 257,—prohibiting a court from inquiring *de hors* the instrument as to its character even when it has taken its form to avoid payment of a stamp tax.

17 Unless this Court reverses that ruling there is absolutely not a shadow of argument in behalf of the contention of the Internal Revenue Department in this matter.

The very strongest contention which the learned Attorney General and the Internal Revenue Department make for this case is that Congress, when it enacted the War Revenue Tax in view of the exigencies which might be upon the country in case of a protracted war, would naturally have provided for a stamp tax upon this class of dealing in stocks, and as such papers are not taxed in any other way it must have been the intention of Congress to tax them in this way. But there is no word in the Statute which imposes such tax, and that
18 class of speculative reasoning might put a stamp tax on every letter that a man wrote, as the government would want to insure a large income for war purposes, and nothing would be so efficient as a tax of one-tenth of one cent on every sheet of paper used in letter-writing. The answer to both propositions is, perhaps Congress ought to have done so but it did not.

Stress is laid by the Attorney General in his brief on the fact that the learned Judge in the opinion which he filed (Federal Reporter, 100 page), used the expression that the call under consideration is an "agreement to sell." That statement, in the opinion does not bind either the defendant in error or this court, and is another instance of a court making a correct decision after giving an erroneous
19 argument leading up to it. The fact remains that no agreement to sell anything is ever made in which some purchaser does not agree to buy.

In England, laws regulating stamp duties have been the subject of construction for a long period of years. In Commissioners vs. Angus & Co., Limited, 23, Q. B. D., 579, the court said:

> "Acts of Parliament imposing stamp duties are to be con-
> "strued according to the plain and ordinary meaning of the
> "words used as it appears from the words themselves, as if a
> "means can be found of carrying out a transaction without in-
> "curring liability to stamp duty, the subject is justified in adopt-
> "ing it."

20

Again in Gurr vs. Scudd, Pollock, C.B., 11 Exchequer Rep. 190, held that:

> "If there is any doubt as to the meaning of the words, they
> "ought to be considered in favor of the subject, because a tax
> "cannot be imposed without clear and express words for that
> "purpose."

21 Perhaps there is no better argument to be used to show the fallacy of this ruling than the *reductio ad absurdum.* The court will not seek for a special provision for taking money out of Wall Street brokers, but will deal even-handed justice to all cases similar in principle to the case in point.

Options are not alone given for the sale of personal property or stocks, but it is almost the uniform rule in large real estate transactions, involving millions of dollars, for the enterprising broker who contemplates purchase to secure an option at a given price for an agreed time, in which he may bring together capitalists with money, who may accept an offer with a certainty that their acceptance will
22 be consummated by a transfer of the real estate.

If the construction claimed applies to brokers in stocks, then the construction claimed will apply to dealers in real estate, and whenever a man trading in real estate offers an option on a valuable property at $2,000,000, as is done monthly, if not daily in New York City, then he commits a misdemeanor unless he places upon the option which he signs stamps for $2,000, to cover the possible sale which may result from such option. The utter nonsense of adjudging an agreement to sell to cover options, which would practically put an embargo upon the purchase and sale of all commodities and realty, needs only to be stated to make the refutation of such a con-
23 struction complete.

Another absurdity is legitimately deducible from this ruling of the Commissioner of Internal Revenue. With great magnanimity he has held that if the seller of an option has stamped the option, he is not required to put the stamp also upon the memorandum of sale when such sale is consummated. If that same rule is to apply, then we shall have as a necessary corollary, the following condition:

The promulgation of a rule that, where an option on real estate has been stamped with the necessary $2,000, it will not be necessary to stamp the deed. And so a deed unstamped and upon its face *prima facie* void, must be recorded by a public officer who is express-
24 ly prohibited by law from recording a deed which does not bear the necessary revenue stamps.

The zeal of the Internal Department in collecting revenue from Wall Street brokers is shown in the construction which was put upon "puts" or offers to buy stocks as promulgated by the Internal Revenue Department in Document No. 20,093, date, September 24th, 1898:

25 "It appears to be the intention of the law to include in its "imposition of tax in such cases the agreements to sell and for "the future transfer as well as the actual sales and transfers of "stock and to include such agreements as taxable whether or "not they are afterwards completed. The 'call' privileges issued "by the broker submitting the blank forms are undoubtedly "agreements to sell stock bearing name upon demand of the "bearer of the privileges, while the 'put' comes also as plainly "within the terms of the law declaring any paper, agreement or "memorandum for the future transfer of stock subject to taxa-"tion. If the transaction in any case is completed by a transfer "of the stock, no further tax will be due, the tax having already
26 "been paid upon the agreements made for such transfer."

The department thus included as taxable an offer to purchase as fully as a completed agreement to sell.

The construction of a Statute imposing a tax, to be warranted in law, must be one which will apply either for or against the tax, as the language of the Statute may be applicable in respect to the subject matter under discussion. Now, suppose that the wording of the Statute should have directed the stamp tax in these words:

27 Contracts or papers referring to the purchase and sale of stocks shall each bear a stamp tax of two cents per hundred dollars par value, *except agreements to sell such stocks, which shall not be taxed.*

Would the Internal Revenue Department or the learned Attorney General contend with that wording that they could not tax "calls" because these were agreements to sell?

I think the acumen of either or both officers would be sufficient to determine that these were not agreements to sell, but were offers to sell, inchoate, and requiring the assent of a purchaser to make them agreements to sell. But should not the rule on taxation of agreements to sell work both ways, either for or against the government? And if not, why not?

28 According to the agreed facts in this case, out of options issued on stock of the par value of $3,500,000 sales were consummated by the acceptance of the offer on the part of purchasers in only $550,000, or about one seventh (1/7th) of the options issued. The construction claimed by the Internal Revenue Department, therefore, would have compelled seven (7) times the amount of tax which would have been necessary upon the consummated sales of stocks under such "calls."

29 What one really sells in issuing a "call" is a contract conveying a a privilege to buy, and thereby to complete a sale, but there is no contract to sell because there is no mutual assent and there must be a purchaser whenever there is a seller of stocks. This seems to me to be the easiest statute construed of any I ever saw, and I cannot but expect the supreme court to direct the circuit court of appeals to follow the ruling made by the judge of the circuit court for the second judicial district.

Respectfully submitted,

S. V. WHITE,

30 IN PERSON.